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SUBJECT: FTC CHAIRMAN MAJORAS REVIEWS MICROSOFT CASE IMPACTS WITH
BRUSSELS ATTORNEYS

REF : USEU BRUSSELS 2933

¶1. SUMMARY. FTC Chairman Majoras and Ambassador Gray reviewed U.S. and EU competition developments with nine prominent Brussels attorneys on Oct. 19. The group focused on the EU victory in its antitrust case against Microsoft, but also covered pending EU cases against other tech firms. Majoras and most participants agreed the Microsoft case underlines a strengthening divergence between U.S. and EU approaches to dominance cases. Majoras discounted a theory that U.S. foreign and domestic political difficulties may have allowed the EU to assume global leadership on antitrust policy. END SUMMARY.

MAJORAS COVERS MICROSOFT WITH BRUSSELS ATTORNEYS

¶2. Federal Trade Commission (FTC) Chairman Deborah Platt Majoras, in town for a European Competition Journal event, met for breakfast October 19 with nine of Brussels' leading competition policy attorneys. Also attending for the USG were: U.S. Ambassador to the European Union C. Boyden Gray; Randall Long, Attorney-Advisor to Chairman Majoras; and Econoff (notetaker). The attending attorneys and represented firms included: Ian Forrester, White and Case; Maurits Dolmans, Cleary Gottlieb; David Hull, Covington and Burling; Sven Volcker, WilmerHale; Stephen Kinsella, Sidley and Austin; Hendrik Bourgeois, GE; Jim Venit, Skadden Arps; David Wood, Gibson Dunn; and Thomas Vinje, Clifford Chance.

¶3. Ms. Majoras reviewed recent U.S. antitrust developments, noting a possible trend in U.S. courts to raise the bar for blocking mergers, but quickly turned to the situation in the EU. She said she had conferred closely with Thomas Barnett, DOJ Assistant Attorney General for Antitrust, on potential implications of the recent European Court of First Instance (CFI) ruling upholding the European Commission's major 2004 antitrust decision against Microsoft (reftel). Majoras noted that EU Competition Commissioner Neelie Kroes reacted strongly to the Barnett/DOJ statement on the CFI decision, which indicated "it could harm consumers and have a chilling effect on innovation."

¶4. Despite Kroes' sensitivity to criticism over the Microsoft case, Majoras continued, FTC and DOJ, as the two U.S. antitrust agencies, maintain good relations with their European counterparts. She stressed the strength of her personal relationships, for example, with Commissioner Kroes and Director General of the Competition Directorate (DG COMP) Philip Lowe. She pointed out that FTC and DOJ will have annual bilateral consultations in 10 days with the Commissioner, Lowe, and their staff.

¶5. Majoras said her concern centers on the increasing divergence, in her view, between the trends of U.S. and EU antitrust policies and court decisions in the area of single-firm conduct. Even Microsoft opponents in the U.S., she underscored, are wondering if the outcome of the case will embolden the Commission to pursue more aggressively cases against other market-leading technology firms, most of whom are American. Ambassador Gray noted the contrast between DG Competition's action against U.S. firms, and timidity in addressing the anti-competitive nature of aggressive Gazprom efforts to purchase EU gas distribution networks.

U.S. AND EU DIFFER IN "CULTURAL APPROACHES" TO ANTITRUST

¶6. Jim Venit of Skadden Arps agreed that it is striking that most of the Commission's cases against multinationals (Note: including existing antitrust cases against Intel, Rambus and Qualcomm, and an investigation of Apple. End note.) involve U.S. firms. He explained, however, that it is important to look at Commission actions in the context of the "cultural differences" across the Atlantic - a greater tradition of regulatory intervention in the EU as compared to the U.S. This manifests itself in both Commission action and greater EU court eagerness to intervene, he said.

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¶7. The best way to approach antitrust cases, Venit continued, would be to stand back and weigh the relative economic impacts of both alleged abuses and potential remedies. Majoras agreed that this is important, but stressed that it is difficult to determine. She noted that applying EU and U.S. antitrust laws pertaining to single-firm conduct (Article 82 of the EC Treaty and the relevant part - "Section 2" - of the U.S. Sherman Act, respectively) correctly is the hardest job for an antitrust enforcer. It is a challenge to avoid both overenforcement and underenforcement, she concluded, and a jurisdiction's tolerance for one or the other determines the level of enforcement.

¶8. David Wood of Gibson Dunn agreed with both Venit and Chairman Majoras, saying that the different cultural approach to antitrust in the EU underlies the divergence here from U.S. action. Article 82, he noted, in looking at dominance cases, does not address how companies achieved monopoly status. He contrasted the case of firms which came to dominate markets through innovation and business acumen, versus those arriving via privileged position as a state-owned firm. The distinction is important in U.S. decisions on antitrust, he said.

¶9. Maurits Dolmans of Cleary Gottlieb (Note: who represents both IBM and Google, Microsoft opponents in its EU case. End note.) argued that the CFI ruling and 2004 Commission decision against Microsoft actually brings U.S. and EU law closer together, rather than representing a divergence. He said the bases for the CFI decision closely resemble findings of the DC circuit court from the U.S. case against Microsoft several years ago. He noted that EU competition law, in the form of Articles 81 and 82 of the founding EC Treaty, were written by a U.S. lawyer and based on the relevant Sections 1 and 2 of the FTC Act. It is important to remember the similarities in legal bases, Dolmans said, and maintain a positive tone in responding to EU antitrust actions.

MAJORAS DISAGREES THAT EU HAS ASSUMED ANTITRUST LEADERSHIP

¶10. Ian Forrester of White and Case (Note: who has represented Microsoft in its EU case. End note.) then asked Chairman Majoras her view of the theory, which he said is favored by some in

Brussels, that political difficulties faced by the U.S. administration in foreign policy (e.g. Iraq) or domestically have weakened U.S. antitrust enforcement. This, according to theory proponents, has allowed the EU to assume the mantle of antitrust leadership and let the EU set the global standard for antitrust actions.

¶11. Hendrik Bourgeois of GE agreed that this idea has taken root in Brussels, noting that a "senior DG COMP official" told him recently that the U.S. and EU are competing over antitrust policy - "and the EU is winning."

¶12. Majoras vigorously disputed the idea, saying that FTC under her tenure has initiated more merger cases (as a percentage of H-S-R filings) against firms than had the Clinton Administration.

Moreover, Majoras emphasized that the number of cases brought is not as important as bringing analytically sound cases. The Ambassador called the idea an "extraordinary," unfounded assertion. Majoras added that the U.S. doesn't consider itself in competition with the EU over antitrust policy, but rather wants to continue dialogue to ensure that actions are in the best interest of consumers and firms.

Nearly all of the participants agreed that continued U.S.-EU dialogue is vital to prevent future problems.

¶13. FTC Chairman Majoras has cleared this cable.

GRAY